LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 14 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 230

40 Cases, More or Less, of Six One-Gallon Cans Article Labeled in Part (can) "Pinocchio Brand 75 Percent Corn, Peanut Oil and Soya Bean Oil Blended with 25 Percent Pure Olive Oil—Packed by A.M.S. PACKING COMPANY, New York," at Syracuse, New York, and A.M.S. PACKING COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BERNARD RESWICK,
Attorney for Petitioners,
Office & P. O. Address,
225 Broadway,
New York 7, N. Y.

JULIUS ZIZMOR,
Of Counsel.

LODER APPEAL PRESS, INC., 41 VESEY STREET WOrth 2-0689

INDEX

PAGE

Summary Statement of the Matter Involved 2

The Pleading 2

The District Court's Decision 4

The Court of Appeals' Decision 4

Jurisdiction 5

Questions Presented 5

Reasons for Granting the Writ 5

ARGUMENT:

The District Court was without jurisdiction and no offense was committed under 21 U. S. C. 301 *et seq.* since the manufactured goods—Pinocchio Brand—were not shipped and or held for sale after alleged shipment in interstate commerce 7

If the Food & Drug Act were applicable to petitioner's food product manufactured and sold locally, the act and the libel issued pursuant thereto, would be violative of Section 8, Clause 3, Article 1, U. S. Constitution 12

Conclusion 15

PAGE

APPENDICES:

APPENDIX I.—Opinion of United States Court of Appeals for the Second Circuit 17

APPENDIX II.—Order and Judgment of Reversal of United States Court of Appeals for the Second Circuit 22

APPENDIX III 24

APPENDIX IV 24

CASES CITED

A. L. A. Schecter Poultry Corp. v. U. S., 295 U. S. 495 15

Brosious v. Pepsi-Cola Co., 155 Fed. (2) 99, C. C. A. 3 12

Carter v. Carter Coal Co., 298 U. S. 238 14

Commonwealth v. DiMeglio, 117 Atl. (2d) 767, reversed on other grounds, 122 Atl. (2d) 77 13

Foster Bros. Mfg. Co. v. National Labor Relations Board, 85 F. (2) 984 14

Hammer v. Dagenhart, 245 U. S. 251 14

U. S. v. An Article or Device Consisting of 31 Units (Gonsertron), 180 Fed. Sup. 52 ..... 8, 11

U. S. v. National Garment Co., 10 F. Supp. 104 14

U. S. v. Sutherland, 9 Fed. Sup. 204 14

STATUTES CITED

	PAGE
21 U. S. C. 301, et seq.	2, 3, 5, 7, 8
U. S. Constitution, Sec. 8, Clause 3	5
Agriculture and Markets Law of New York, Sec. 199(a)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

40 Cases, More or Less, of Six One-Gallon Cans Article Labeled in Part (can) "Pinocchio Brand 75 Percent Corn, Peanut Oil and Soya Bean Oil Blended with 25 Percent Pure Olive Oil—Packed by A.M.S. PACKING COMPANY, New York." at Syracuse, New York, and A.M.S. PACKING COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

A.M.S. Packing Company and 40 cases more or less etc. petition for a writ of certiorari to review: a judgment and order (36a, Appendix II hereof) of the United States Court of Appeals for the Second Circuit, entered April 19, 1961, which reversed a decree of the United States District Court for the Northern District of New York, dismissing the libel herein and reinstated such libel.

Summary Statement of the Matter Involved

The Pleading

This proceeding was instituted pursuant to the provisions of 21 U. S. C. 301 *et seq.* It is alleged (1a, par. 2) that A. M. S. Packing Company of Ozone Park, New York City, hereinafter referred to as "AMS" shipped to Aiello Co., Utica, New York, who in turn delivered to LaGondola Food Corporation, Syracuse, New York, an article of food consisting of 40 cases of Pinocchio Brand Oil, labeled in part:

> "Pinocchio Brand 75 percent corn, peanut oil and soya bean oil blended with 25 percent pure olive oil—packed by A. M. S. Packing Company, New York."

That said goods (Pinocchio Brand) were manufactured in New York by AMS from ingredients (corn, peanut, olive and soya bean oils) received from outside the State of New York (2a, par. 2); that an examination of the article—Pinocchio Brand—shows that there is little or no olive oil therein (2a, par. 3); that the article was adulterated by the substitution of a mixture of vegetable oils in place of a blend of vegetable oils and olive oil (2a, par. 4) and that the (label) statement that it contains 25% pure olive oil was false (2a, par. 5).

In the District Court the Government conceded that the various oils—neither adulterated nor misbranded—obtained from out of State were not held for sale after shipment to this state. Instead it asserted that such ingredients were manufactured and blended in New York by AMS into a new and different product—Pinocchio Brand—

which lacked 25% olive oil as set forth on the label (see opinion of Foley, J., 13a-15a and Government's brief in the District Court).[1] Thus, the entire offense (misbranding and or adulteration) occurred solely in New York with respect to the newly created Pinocchio Brand, and the manufacture, shipment and sale thereof was *intrastate* between New York City, Syracuse and Utica (13a-14a). *At no time was Pinocchio Brand the subject of interstate shipment.* In these circumstances there can be no violation of the Food & Drug Act which invests the Court with jurisdiction *only* if the merchandise transgressed the statute *when* introduced in and or held for sale after shipment in *interstate commerce.*

Pertinent Statute (21 U. S. C.):

> "334. Seizure—Grounds and jurisdiction.
>
> (a) *Any* article or food, drug, device or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of

1. On page 2 of the Government's brief submitted in the District Court it set forth its claim as follows: "that the component parts of the final product which were seized in this action were shipped to AMS Packing Co., Ozone Park, New York from New Jersey, Illinois, Georgia, and imported from Spain, Italy and Tunisia". On page 3 it stated that AMS manufactured Pinocchio Brand in New York "from components received in interstate commerce. * * * *The blending an labeling of the oils after their interstate shipment resulted in the adulteration and misbranding*".

In its supplemental brief it declared: "It is the Government's contention that the AMS Packing Company, Inc. caused a number of vegetable oils to be blended together, after those oils had been shipped in interstate commerce, in such a manner that the combination of oils became misbranded".

> Section 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the Article is found."

The District Court's Decision

The Court held that Pinocchio Brand, the product libeled was not shipped, introduced or held for sale after shipment in interstate commerce and hence not subject to the provisions of the Food & Drug Act. Its opinion (17a) is reported in 188 F. Supp. 290.

The Court of Appeals' Decision

The Court of Appeals opinion (29a, appendix 1 hereof) reported in 289, F. (2d) 343, reversed and held that even though Pinocchio Brand was manufactured, sold and shipped solely intrastate, is was seizable because ingredients used in its manufacture had come from out of state. There was neither claim nor proof that such ingredinets - which admittedly were neither misbranded or adulterated--were held for sale after shipment in interstate commorce; instead as indicated they were manufactured in New York into a new and wholly different blended article known as "Pinocchio Brand" and shipped intrastate.

The Court however unfortunately misconstrued the record because on page 32a of its opinion it states with respect to Pinocchio Brand--the manufactured product:

> "• • • each of its separate components was being held for sale after shipment in interstate commerce."

As already indicated, pages 2-3, *supra*, and the footnotes thereon, the foregoing assertion is not supported by the record nor was such claim even asserted by the Government. Indeed, we believe that if the Government's brief to be submitted herein is written with integrity it will admit the validity of our contention in this regard.

Jurisdiction

The judgment and order of the Court of Appeals was entered on April 19, 1961. The jurisdiction of this Court to review by writ of Certiorari the judgment and decree complained of is conferred by title 28 U. S. C. 1254. Appendix III hereof.

Questions Presented

1. Does Section 21 U. S. C. 334 (Food & Drug Act) authorize the libel and seizure of a food product manufactured and sold locally intrastate, i.e., solely within the State of New York, and which at no time was the subject of interstate shipment and/or commerce merely because ingredients therein contained came from out of State?

2. If the Food & Drug Act does authorize such seizure, does it not infringe and violate the constitution in that it permits Federal authorities and Congress to regulate and police intrastate commerce (Sec. 8, Clause 3, U. S. Constitution).

Reasons for Granting the Writ

The Court below decided substantial questions of Federal Law contrary to statute and not in accordance with applicable decisions of this Court and the United States Constitution.

We urge:

(1) That the questions involved herein were decided erroneously by the Court below, are substantial, recurring, of national importance and petitioner has been deprived of its property in violation of law.

(2) Questions 1 and 2 involving the right of the Food & Drug Administration to seize articles manufactured locally and sold intrastate merely because ingredients used in its manufacture came from out of state, has never been passed upon by this or any Federal Appellate Court. The seizure and condemnation powers of the Food & Drug Act here asserted, have never previously been invoked or claimed by the Food & Drug Administration to apply to food manufactured locally and sold intrastate.

The Food & Drug Administration attaches vast importance to this case, as witness the fact that on November 25, 1960 it issued a special bulletin (release) published in the Wall Street Journal of that day indicating that this was a "test case" of great significance in its drive to bring food manufactured locally within the orbit of the Act and its jurisdiction, and that unless its authority to act herein were upheld "a *'significant number' of cases will be removed from the agency's reach.*" The release further stated the Supreme Court has never interpreted the scope of the agency's power under the 1948 amendment to seize goods manufactured locally and sold intrastate.

If the present attempt at power by Food & Drug is upheld it means that the Act will affect every food product manufactured locally from wholesome ingredients obtained from out of state—even though the manufactured product is sold intrastate—a revolutionary concept

in the enforcement of the law, and recasting with strange meaning the definition of interstate commerce and the term "while held for sale after shipment in interstate commerce".

We therefore urge, that the far reaching effect of the decision below; its engulfment of every intrastate business transaction and every food product manufactured locally from ingredients which do not offend the law; its conflict with constitutional mandate which prohibits Congressional encroachment on or regulation of intrastate commerce impels that in the public good its validity be passed upon by this Court.

Argument

We shall show in the argument which follows:

A. The Food & Drug Act does not authorize the seizure of the libeled goods and no offense was committed by petitioner under 21 U. S. C. 301 *et seq.*, since the manufactured goods—Pinocchio Brand—an intrastate product —were not shipped in interstate commerce or held for sale after shipment in interstate commerce; hence there was no jurisdiction to seize the goods:

B. If the act were applicable, it would be violative of the U. S. Constitution which permits Congressional regulation over commerce between states only—not commerce which is solely intrastate in character.

The District Court was without jurisdiction and no offense was committed under 21 U. S. C. 301 *et seq.* since the manufactured goods—Pinocchio Brand—were not shipped and or held for sale after alleged shipment in interstate commerce.

There is no claim at bar that the various ingredients, *i.e.*, peanut, corn, olive and soya bean oils were adul

terated or misbranded when shipped to and/or received from out of state by AMS. NOR IS IT ALLEGED THAT SUCH INGREDIENTS WERE HELD FOR SALE AFTER SHIPMENT IN INTERSTATE COMMERCE. Instead, the allegation is that these constituents were blended (manufactured) into a new article —Pinocchio Brand—by AMS in New York in the different proportions set forth on the label and that the labeling (that Pinocchio contains 25% olive oil) constitutes misbranding and/or adulteration [2]—there allegedly being a deficiency in the olive oil content of the manufactured article. In other words, wholly innocent merchandise (ingredients) was received in bulk form from out of state but offended the statute only *after* it was transformed into a *new* article which was shipped to Syracuse, New York, *intrastate*.

In these circumstances Pinocchio Brand did not offend the law nor was it in the words of the statute (21 U. S. C. 334(a)), "adulterated or misbranded when introduced into or while in interstate commerce, or while held for sale * * * after shipment in interstate commerce * * * *". Pinocchio was created in this state and moved solely intrastate. The wrong, if any, occurred in connection with such newly manufactured article by reason of acts committed *wholly* within the State of New York, and hence this transaction falls within the orbit of intrastate—not interstate commerce, and the libel was wrongfully filed.

A case directly in point and factually parallel with ours is *U. S. v. An Article or Device Consisting of 71 Units (Gonsertron)*, 180 Fed. Sup. 52. In dismissing the libel, the Court said:

---

2. There is no essential difference between misbranding and/or adulteration at bar since deficiency in olive oil content is the crux of the violation charged.

"The accused device was manufactured by the Gonsertron Corporation in Michigan. Nine component parts received by the corporation from various states in the union were used in the manufacturing process. These component parts are in common use in industry. * * *

Sec. 334(a) of 21 U. S. C. provides that a misbranded device may be proceeded against on libel of information and condemned in any District Court of the United States within the jurisdiction where the article is found 'when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce.'

The Government agrees that the manufactured device was not introduced in interstate commerce or held for sale in interstate commerce. It contends however, that Sec. 321(h) of 21 U. S. C. A. defines device to mean 'instruments, apparatus, and contrivances, including their components, parts, and accessories,' and therefore concludes that since some of the components used in the manufacture of the device were transported in interstate commerce, the device must also be considered to have been introduced in interstate commerce. Sec. 321 (h) merely provides that if a device is subject to libel, all the component parts and accessories are also subject to libel. Neither the language of Sec. 321 (h) nor the cases cited by the Government support the construction of Sec. 321(h) that the Government urges.

Moreover, if Sec. 321(h) were construed to give this Court jurisdiction by virtue of the shipment of the components to Michigan, grave doubt would exist as to its constitutionality. For example, in

Ewing-Von Allmen Dairy Co. v. C and C Ice Cream Co. Inc., 6 Cir., 109 F. 2d 898, 900, the Court states:

"The ingredients which came from without the state ceased to be a part of interstate commerce when manufactured and sold in Kentucky. The sales in appellants' retail stores were entirely of a local nature, made after all transportation, local and interstate, had ceased, and were beyond the regulatory power of Congress over interstate commerce.' See, also, Lawson v. Woodmere, Inc. D. C. 120 F. Supp. 267."

At bar the libel does not allege that the bulk oils (ingredients) in common use were made to claimant's specifications, or that they were held for sale after shipment to this State, or that the newly manufactured product—Pinocchio Brand—was sold or held for sale outside the State of New York. Note: THE LIBEL ALLEGES THAT PINOCCHIO THE PRODUCT MANUFACTURED IN NEW YORK WAS MISBRANDED AND ADULTERATED; NOT THE ORIGINAL OILS (INGREDIENTS) RECEIVED FROM OUT OF STATE (2o). In a word, Pinocchio brand with a 25% olive oil content was first created in New York and never left its jurisdiction. Hence, the suggestion that Pinocchio Brand manufactured in this state was the *same* as the original ingredients and therefore held for sale after shipment in interstate commerce, is without factual basis.

If the decision below is sound it means that when *an* innocent ingredient obtained from out of state is used intrastate in the manufacture of a good product it *ipso facto* casts such product into the embrace of the Food & Drug Act and its provisions of "held for sale after shipment in interstate commerce"—even though the ingredient is not held for sale and the manufactured product is made and sold locally and has never been the subject of inter

state shipment. Such is not the law and leads to a ludicrous situation.

For example, let us assume that a baker in New York buys rye flour from Minnesota, which is neither adulterated nor misbranded; that upon receipt thereof in this state he bakes it into bread but affixes thereto a label stating that it is made from whole wheat flour and sells such bread to a New York consumer. According to the Government's theory it can seize as misbranded and adulterated every loaf of such bread made and sold locally, on the ground that it constitutes interstate commerce or is an article held for sale after shipment in interstate commerce because an ingredient therein—flour—came from Minnesota.

This is sheer nonsense. The bread made here was never shipped interstate whereas the flour, neither misbranded nor adulterated, was not held here for sale. Instead such flour was manufactured into a different product, bread which was sold locally, and the manufactured product not the flour ingredient is claimed to have infringed the statute.

To void or give effect to the government's argument would be to obliterate what has always been recognized as intrastate dealing and formulate a new concept of [illegible] New York has sufficient laws to deal with alleged offenders who misbrand food, Agriculture and Markets Law of New York, Sec. 199-a; Appendix IV hereof) and create but one channel of trading, interstate commerce. Every transaction would be engulfed by Federal rule. Such a construction is violative of and contrary to the language of the statute and was struck down in *United States v. 1 Dr. Ltd. v. United States Government*, *supra*, which found the constitutionality thereof to be dubious.

That the new product—Pinocchio Brand—made and shipped intrastate by AMS does not fall within the definition of interstate commerce and/or held for sale after shipment in interstate commerce, is further confirmed by *Brosious* v. *Pepsi-Cola Co.*, 155 Fed. (2) 99, C. C. A. 3, where the facts were strikingly similar to those at bar. The Court said:

> "The concentrate * * * was shipped from New York to * * * Pa. where the article of trade was compounded and packaged. Did the interstate movement of the concentrate end when the 10 gallon containers of concentrate were received at Cloverdale Spring Co.'s plant; or did it in its transition with other substances into a bottled and labelled beverage sold to the trade continue in the flow of interstate commerce. *We are of the opinion that the interstate movement ended with the containers resting in Cloverdale (Pa.) Warehouse.*"

If the Food & Drug Act were applicable to petitioner's food product manufactured and sold locally, the act and the libel issued pursuant thereto, would be violative of Section 8, Clause 3, Article 1, U. S. Constitution.

Such provision entitled "Regulation of Commerce" authorizes Congress "To regulate commerce with foreign nations, and among the several States and with the Indian Tribes". It does not vest Congress with authority to enact laws or legislate with respect to *intrastate* transactions. Thus, where ingredients are shipped interstate and used in *this* state in the manufacture of a food product, the latter is deemed to be wholly different from the ingredient and may not be seized under the provisions of the Food & Drug Act. Such has been the ruling of many

Courts. *Commonwealth* v. *DiMeglio*, 117 Atl. (2d) 767, reversed on other grounds, 122 Atl. (2d) 77, is strikingly parallel with ours. There an ingredient obtained from out of state was used in the manufacture of a lemon pie in Pennsylvania. The Court held that the pie even though made from ingredients obtained from out of state constituted intrastate commerce. The Court said, page 772:

> "It should be further noted that the Pennsylvania legislation does not prevent the shipping into, or sale of the Jell-O product within, this Commonwealth. Indeed, the product is freely sold for home use throughout the State. *If the ingredients alone* had been held for sale after shipment in interstate commerce the situation would be entirely different. However, the addition of egg yolks, water and pie crust makes a completely different, and new product. The Jell-O filling thus loses its interstate characteristic and becomes entirely intrastate in every respect. In Parrott & Co. v. Benson, 114 Wash. 117, 194 P. 986, 988, the Court said: 'the act we are now considering can only operate after the eggs have lost their status as articles of foreign or interstate commerce, and have become a part of the great mass of domestic property as completely as though produced within our borders. Surely when an egg reaches a restaurant, hotel, or bakery and is taken from the package, cooked or mixed with other ingredients, and served to the guest or purchaser as food, it requires no argument or authority to establish beyond cavil that it is no longer an article of foreign commerce over which Congress alone has control; otherwise no article once brought from without into the state, no matter how changed by any conceivable process, could ever become subject to state legislation; but authorities are as numerous as the question is simple'."

The language in *U. S.* v. *Sutherland*, 9 Fed. Sup. 204, 207, is fittingly applicable:

> "If the sale of a bunch of shingles in defendants' lumber yard at Tulsa to a purchaser for cash at that lumber yard is a transaction in interstate commerce solely because the shingles were imported by the defendants from the State of Oregon, then the sale of a sack of flour by a grocer to the housewife who calls at his store is a transaction in interstate commerce if the flour was bought by the grocer, as usually is the case, from a wholesaler or miller in another state. Under such a theory almost every sale made by any merchant in every city, town and hamlet in the United States is a transaction in interstate commerce. The theory is supported neither by reason nor precedent. • • •
>
> The Supreme Court long since has decided that interstate commerce ends when goods imported from another state have been brought to rest and are offered for sale. Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257; Public Utilities Commission v. Landon, 249 U. S. 236, 245, 39 S. Ct. 268, 63 L. Ed. 577. And the Supreme Court long since has decided that interstate commerce has not yet come into existence until the final movement of the things alleged to be in interstate commerce has begun. Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715."

See also, *Hammer* v. *Dagenhart*, 245 U. S. 251; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Foster Bros. Mfg. Co.* v. *National Labor Relations Board*, 85 F. (2) 984 and *U. S.* v. *National Garment Co.*, 10 F. Supp. 104, 107, where the Court held that goods manufactured and sold intrastate were not subject to control or legislation by Con-

gress even though ingredients therein emanated from out of state.

In *A. L. A. Schecter Poultry Corp.* v. *U. S.*, 295 U. S. 495, the Court held that where live poultry was obtained from out of state, but slaughtered and sold within this state, Congress had no power to regulate the transaction after the goods had arrived in this state. The Court said:

> "The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce, and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states."

IN CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BERNARD RESWICK,
Attorney for Petitioners.

JULIUS ZIZMOR,
Of Counsel.

APPENDIX I

Opinion of United States Court of Appeals for the Second Circuit

LUMBARD, *Chief Judge*:

The single question before us on this appeal is whether §304(a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. §334(a), authorizes the United States to proceed against and seize mislabeled or adulterated cans of blended vegetable oils mixed entirely within the State of New York from various oils shipped under proper labels from other states and foreign countries. Section 304(a) permits seizure of food which is "adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce. • • • " The district judge held that the blended oil was a "new product" and therefore not the same as those shipped in interstate commerce. He dismissed the libel. 188 F. Supp. 290 (N. D. N. Y. 1960).

In its libel, the allegations of which must be taken as true on review of the decision to dismiss, the United States charged that forty cases of six one-gallon cans of "Pinocchio" brand oil were delivered to the La Gondola Food Corporation in Syracuse; that they were being held for sale after interstate shipment; that the cans were labeled "25 per cent pure olive oil"; that examination showed that the cans contained little or no olive oil; and that the oil was therefore "adulterated" within the meaning of §402(b)(2) or "misbranded" within the meaning of §403(a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. §§342(b)(2), 343(a).

An answer to the libel was filed by the A. M. S. Packing Company, which alleged that it had blended and packed

the oil attached under the libel; that the blend was as represented on the labels of the cans; and that all steps in the manufacturing and/or blending of the oils had taken place within the State of New York. On the basis of its allegation that the blending had been done in New York, the company put in issue the jurisdiction of the federal court and moved to dismiss the libel.

The United States did not in the district court or here challenge the truth of the company's assertion that the blending process was done entirely within the State of New York, nor did it claim that the blended oil was carried across any state line. It is also undisputed that the various oils from which the blend was made had been shipped under proper labels from New Jersey, Illinois and Georgia, and that olive oil had been transported to the company's plant in Ozone Park, New York, from Spain, Italy and Tunisia. The United States contends that although the component oils were correctly labeled when shipped interstate, the misbranding or adulteration which occurred during or after the blending of the oils brought them within the compass of the federal act as articles of food held for sale after interstate shipment.

From 1938 to 1948, the Food, Drug, and Cosmetic Act provided for condemnation of articles of food that were adulterated or misbranded only "when introduced into or while in interstate commerce." This language was held not to authorize seizure of food that was pure and properly labeled while in interstate commerce and became adulterated or misbranded only after the interstate voyage had been completed. *United States* v. *Phelps Dodge Mercantile Co.*, 157 F. 2d 453 (9th Cir. 1946), *cert. denied*, 330 U. S. 818 (1947). In 1948, however, Congress amended §304(a) so as also to permit seizure of food that is adulterated or misbranded "while held for sale (whether or

not the first sale) after shipment in interstate commerce." 62 Stat. 582. Had the company in this case not mixed the oils it received from various sources but instead pasted new misleading labels on the containers in which they were shipped in interstate commerce or otherwise adulterated the oils, seizure would have been authorized. The appellee would have us hold here that the blending of the oils which had been transported in interstate commerce took the final product out from under federal regulation although each of its separate components was being held for sale after shipment in interstate commerce. We do not agree.

The original Food and Drug Act of 1906 authorized seizure only if the adulterated or misbranded food or drug was being transported in interstate commerce, "or, having been transported, remains unloaded, unsold, or in original unbroken packages." §10, 34 Stat, 771. The "original package" limitation was omitted when the Food, Drug, and Cosmetic Act of 1938 supplanted the prior law. The appellee cannot, therefore, prevail here on the theory that the oil seized was not in the same container as was used for its shipment in interstate commerce.

The appellee contends that the packing company here did more than merely break open the original package. It argues that the processing of the oils in Ozone Park, New York, created a new product—a blend of many different vegetable oils—which was not the same as the food transported in interstate commerce and therefore could not be seized as food held for sale after shipment in interstate commerce. We disagree.

In enacting the 1948 amendment to the Pure Food, Drug, and Cosmetic Act, Congress sought to fill the gap in the regulatory scheme pointed out in *United States* v. *Phelps Dodge Mercantile Co., supra*, by subjecting to condemna-

tion food which had been adulterated or misbranded after coming to rest within a state but before being sold to a consumer. The interest of the federal government in ensuring that such food meets minimum standards of purity and is not misbranded arises out of its supervisory function over interstate commerce. The House and Senate reports both referred expressly to the Congressional desire to protect the integrity of interstate products so as not to depress the demand for goods that must travel across state lines. See H. R. Rep. No. 807, 80th Cong. 1st Sess. 4-5 (1947); S. Rep. No. 1221, 80th Cong. 2d Sess. 3-4 (1948). This interest surely extends to products such as olive oil, which a New York consumer would probably recognize as out-of-state or foreign in origin.

Moreover, in this case all the components of the oil blend had been transported in interstate commerce, and the completed mixture was being held for sale as "oil"—the very same type of food which had traveled across the state line. This is not a case in which oil which was transported interstate was used as one of many ingredients in a finished product which in no way resembled the food which had crossed state lines. Oil may come in many varieties, but to the unsophisticated consumer one oil blend is much like another. We would be undermining the remedial legislative purpose of consumer protection were we to deny the power to seize misbranded articles on the ground that such foods as corn oil, peanut oil, soya bean oil and olive oil when mixed constitute a "different product" from a blend of less than all or from a pure measure of any one of them. Cf. *United States* v. *Urbuteit*, 335 U. S. 357-58 (1948).

The appellee relies heavily, as did Judge Foley in dismissing the libel, on *United States* v. *An Article or Device Consisting of 31 Units (Gonsertron)*, 180 F. Supp. 52

(E. D. Mich. 1959). That case has been limited considerably by a more recent decision by the same district judge. See *United States* v. *An Article of Drug Consisting of 39 Cases* (*Korleen*), ... F. Supp. .... (March 14, 1961). In any event, the *Gonsertron* case is distinguishable since the misleading aspect of the pamphlets which accompanied the condemned device related there to remedial qualities purportedly possessed by one entire apparatus, which had been assembled wholly within the State of Michigan. None of the separate components which had been transported in interstate commerce was misbranded; it was the labor of assembling the components, which when assembled purportedly constituted an electrotherapy device, which was misrepresented. Here, however, the misbranding related directly to the percentage content of the olive oil shipped in interstate commerce. Congress' policy may not extend to assuring a consumer that *all* representations regarding any device or food made up of components transported in interstate commerce are true, but it at least goes so far as to assure him that the interstate elements themselves are not misrepresented.

Congress surely intended the provisions of the Food, Drug, and Cosmetic Act to apply to foods processed within a state, after shipment in interstate commerce, as was the case here. The statute must be read and applied broadly in order to effectuate its remedial purpose. Cf. *Kordel* v. *United States*, 335 U. S. 345, 349 (1948). We have no doubt of the power of Congress so to protect the public with respect to foodstuffs which have been shipped in interstate and foreign commerce, see *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 57-58 (1911); cf. *United States* v. *Kahriger*, 345 U. S. 22, 29-30 n. 6 (1953), and we reverse the order of the district court dismissing the libel.

APPENDIX II

Order and Judgment of Reversal of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Court House in the City of New York on the Nineteenth day of April, One Thousand Nine Hundred sixty one.

Present: HON. J. EDWARD LUMBARD
Chief Judge

HON. J. WARREN MADDEN
Judge, Court of Appeals

HON. STERRY R. WATERMAN
Circuit Judges

UNITED STATES OF AMERICA
Plaintiff Appellant

v.

40 Cases, More or Less, etc.
Defendant, appellee

Appeal from the United States District Court for the Northern District of New York.

This Cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this Court.

A. DANIEL FUSARO
Clerk

APPENDIX III

Title 28 U. S. C.

§1254. Court of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

APPENDIX IV

Agriculture and Markets Law of the State of New York.

§199-a. Prohibition as to adulterated or misbranded food. No person or persons, firm, association or corporation shall within this state manufacture, compound, brew, distill, produce, process, pack, transport, possess, sell, offer or expose for sale, or serve in any hotel, restaurant, eating house or other place of public entertainment any article of food which is adulterated or misbranded within the meaning of this article.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	12

CITATIONS

Cases:

Brosious v. *Pepsi-Cola Co.*, 155 F. 2d 99 — 9

Lee v. *United States*, 187 F. 2d 1005 — 6

United States v. *Allbrook Freezing and Cold Storage, Inc.*, 194 F. 2d 937 — 6

United States v. *An Article or Device Consisting of 31 Units * * * Labeled "Gonsertron Corporation,"* 180 F. Supp. 52 — 8

United States v. *An article of Drug consisting of 39 cases (Korleen)*, 192 F. Supp. 51 — 8

United States v. *Antonio Corrao Corp.*, 185 F. 2d 372 — 7

United States v. *4 Devices * * * "Color Therm"*, 176 F. 2d 652 — 6

United States v. *Phelps Dodge Mercantile Co.*, 157 F. 2d 453, certiorari denied, 330 U.S. 818 — 9

United States v. *Sullivan*, 332 U.S. 689 — 8, 9, 10

Statutes:

Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 62 Stat. 582 (21 U.S.C. 301)

Section 201(f) (21 U.S.C. 321(f)) — 2, 7

Section 301(k) (21 U.S.C. 331(k)) — 10

Section 304(a) (21 U.S.C. 334(a)) — 2, 4

604429—61——1

Miscellaneous:

Hearing before a Subcommittee of Committe on Interstate and Foreign Commerce, United States Senate, 80th Cong., 2d sess., on S. 1190 and H.R. 4071, April 17, 1948, p. 9 ..... Page 6
H.R. Rep. No. 807, 80th Cong., 1st Sess. p. 6 5
S. Rep. No. 1221, 80th Cong., 2d Sess. p. 1, 3–4, 4 ..... 5, 9, 11

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 230

40 CASES, MORE OR LESS OF SIX ONE-GALLON CANS ARTICLE LABELED IN PART (CAN) "PINOCCHIO BRAND 75 PERCENT CORN, PEANUT OIL AND SOYA BEAN OIL BLENDED WITH 25 PERCENT PURE OLIVE OIL—PACKED BY A.M.S. PACKING COMPANY—," AT SYRACUSE, NEW YORK, AND A.M.S. PACKING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17–21) is reported at 289 F. 2d 343. The opinion of the district court (R. 12–16) is reported at 188 F. Supp. 290.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1961 (Pet. 22–23). The petition for a writ of certiorari was filed on July 14, 1961. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a blend of food oils prepared wholly from component oils of interstate origin, which is adulterated and misbranded while held for sale in the State in which the blend was prepared, is beyond the reach of the Federal Food, Drug, and Cosmetic Act and Congress' power under the commerce clause of the Constitution.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 1044, as amended, 62 Stat. 582 (21 U.S.C. 301 *et seq.*) provides in pertinent part:

Section 201(f) (21 U.S.C. 321(f)):

> For the purposes of this Act—
> (f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

Section 304(a) (21 U.S.C. 334(a)):

> Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

STATEMENT

This is a seizure action *in rem* under the Federal Food, Drug, and Cosmetic Act involving a number of cases of blended food oils alleged to have been both misbranded and adulterated "while held for sale after shipment in interstate commerce" in that the cans were falsely labeled as containing 25 percent olive oil when they actually contained little or no olive oil, and in that a mixture of vegetable oils with little or no olive oil had been substituted for a blend of vegetable oils and olive oil. The libel also alleged that this food, labeled "Pinocchio Brand 75 percent corn, peanut oil, and soya bean oil blended with 25 percent pure olive oil," had been manufactured by the claimant-petitioner A.M.S. Packing Co., Ozone Park, New York, from ingredient oils received in interstate commerce: corn oil and soya oil from New Jersey and Illinois, peanut oil from Georgia and New Jersey, and olive oil from Spain, Italy and Tunisia. The particular lot involved had been shipped by petitioner from Ozone Park, New York, to a company in Utica, New York, which delivered it to another company in Syracuse, New York, where it was seized (R. 1–7).

Petitioners filed a claim and answer denying the allegations of misbranding and adulteration and praying dismissal of the libel for lack of jurisdiction on the ground that "the goods seized herein were blended and/or manufactured * * * in Ozone Park, New York, and shipped by it to * * * Utica, New York,

* * * and that such sale constitutes intrastate commerce and not interstate commerce * * *" (R. 8–9).

The district court dismissed the libel, holding that the blend of oils was "a new product or complete article of intrastate manufacture" (188 F. Supp. at 291) which did not come within the reach of the clause, "while held for sale (whether or not the first sale) after shipment in interstate commerce," in Section 304(a) of the Act (*supra*, p. 2).

The court of appeals reversed. It rejected the reasoning of the district court that the mixture of oils "constitute[s] a 'different product' from a blend of less than all or from a pure measure of any one of them" (Pet. 20) and held that (Pet. 21):

> Congress surely intended the provisions of the Food, Drug, and Cosmetic Act to apply to foods processed within a state, after shipment in interstate commerce, as was the case here. The statute must be read and applied broadly in order to effectuate its remedial purpose. * * *

ARGUMENT

1. Petitioners' contention is that the mixing together of several types of food oils, all of which are received in interstate commerce, creates a "new" article of food that is beyond the reach of the Federal Food, Drug, and Cosmetic Act so long as the sale of the mixture is confined to the State in which the mixing occurs (Pet. 7–12). This theory provides an easy method of evasion and is contrary to the pertinent history of the statute.

The clause in question here, authorizing the seizure of food that is adulterated or misbranded "while held for sale (whether or not the first sale) after shipment in interstate commerce" (*supra,* p. 2), was added by an amendment in 1948 (62 Stat. 582). The purpose of the amendment to reach just such conduct as is involved in this case was clearly stated in S. Rep. No. 1221, 80th Cong., 2d Sess., pp. 3–4:

> In order to prevent the frustration and defeat of its purpose, Congress must exercise its power to continue that protection against articles that become filthy, decomposed, deteriorated, or otherwise adulterated or misbranded while awaiting sale to the ultimate consumer. Otherwise the safeguards which were designed to maintain the integrity of the products to the end of their interstate journey become valueless.
>
> The defilement of products or deterioration in quality or misrepresentation through relabeling or other abusive acts which occur at any time before articles have been sold to consumers leads to dissatisfaction and lack of confidence which depresses the interstate demand for goods of the same type that are neither adulterated nor misbranded. * * * it is necessary that the integrity of the products be preserved so far as possible, up to the time of purchase by the ultimate consumer. * * *[1]

It is noteworthy that one of the specific abuses cited to the Senate Committee by the Associate Commissioner of Food and Drugs as showing the need for the amendment was this:

[1] H.R. Rep. No. 807, 80th Cong., 1st Sess., p. 6, was to the same effect.

> * * * We have known of instances where cans of olive oil would be tapped, and the olive oil drawn off wholly, or in part, and a cheaper oil inserted in lieu of the olive oil; the label of course, bearing the designation "olive oil."[2]

Both the plain language of the statute and this legislative history make it clear that if petitioners had relabeled with the Pinocchio brand label the corn oil received, properly labeled, in interstate commerce, it would have been adulterated and misbranded and therefore subject to seizure. The question here is whether petitioners can, with impunity, accomplish the same abuse by removing several different kinds of oils from properly labeled containers and then placing the oils in new containers which falsely describe the composition of the blend. It would take an extremely narrow view of what Congress has written to hold that this consumer cheat is beyond the reach of the Act.[3]

---

[2] Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 80th Cong., 2d Sess., on S. 1190 and H.R. 4071, April 17, 1948, p. 9.

[3] Cf. *United States* v. *Allbrook Freezing and Cold Storage, Inc.*, 194 F. 2d 937, 939, where the Fifth Circuit stated: "Nor do we find any better taken the second ground for dismissing the libel, that the strawberries after being processed ceased to be the strawberries which moved in interstate commerce and became a new product which cannot be seized unless and until it moves in interstate commerce in its changed form. If this were a sound view, and adulterated constitutents of processed products could be seized only when in their unprocessed form, the enforcement of the act would be easily defeated. That it is not sound, a reading of the Act, which contains no such limitation makes clear. * * *"

See also *United States* v. *4 Devices* * * * "*Color Therm*", 176 F. 2d 652 (C.A. 10); *Lee* v. *United States*, 187 F. 2d 1005 (C.A. 10).

Moreover, the statute defines "food" to include components, Section 201(f), *supra*. The olive oil—little of it as there is in this mixture—is the most expensive and desirable component of the product, such that it controls the market price,[4] and it is misbranded while held for sale because it is described as a 25 percent component when in truth it is a mere trace. The vegetable oil components which comprise the remainder of the blend are equally misbranded while held for sale after interstate shipment because they are falsely labeled to contain a significant amount of olive oil.

Petitioners' *in terrorem* argument that the decision below leads to "ludicrous" results, whereby the use of any innocent interstate ingredient in the manufacture of a product to be sold locally brings the product within the reach of the Act (Pet. 10–11), hardly fits the facts of this case. For as the court of appeals pointed out (Pet. 20):

> in this case all the components of the oil blend had been transported in interstate commerce, and the completed mixture was being held for sale as "oil"—the very same type of food which had traveled across the state line. This is not a case in which oil which was transported interstate was used as one of many ingredients in

[4] "Olive oil is more expensive, and is regarded by consumers as more desirable, than vegetable oils. To cheat consumers, some blenders sold blends of olive and peanut oil (or of other vegetable oils) containing a smaller percentage of olive oil than that stated on the labels. * * *" *United States* v. *Antonio Corrao Corp.*, 185 F. 2d 372, 376 (C.A. 2).

> a finished product which in no way resembled the food which had crossed state lines. * * *[1]

If Congress intended the 1948 amendment to accomplish *any* extension in the coverage of the Act, it surely meant to include such a factual situation as this one.

Petitioners' reliance upon *United States* v. *An Article or Device Consisting of 31 Units* * * * *Labeled "Gonsertron Corporation,"* 180 F. Supp. 52 (E.D. Mich.), is misplaced. There the components that had been shipped interstate were ordinary electrical fixtures, shipped with no intention that they be used in assembling a therapeutic device. They were purchased on the open market by the claimant, who originated the idea that the assembled machine had therapeutic and diagnostic merit. Thus, unlike the situation here where all the component oils had been received in interstate commerce, no "device"—defined by the Act as an article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease (21 U.S.C. 321 (h))—had moved interstate. The same district judge who decided the *Gonsertron* case later distinguished it on that ground in *United States* v. *An article of drug consisting of 39 Cases* (*Korleen*), 192 F. Supp. 51 (E.D.Mich.). The court

---

[1] In rejecting a similar contention in *United States* v. *Sullivan*, 332 U.S. 689, 694, this Court said: "The scope of the offense which Congress defined is not to be judicially narrowed as applied to drugs by envisioning extreme possible applications of its different misbranding provisions which relate to food, cosmetics, and the like. There will be opportunity enough to consider such contingencies should they ever arise."

of appeals below distinguished it on the same ground (Pet. 20–21).[6]

If petitioners are right in their contention that misbranding or adulteration of food "while held for sale * * * after shipment in interstate commerce" can be removed from the reach of the Act by any change, however slight, in the form of the product, there would be a significant loophole for evasion. For example, many misbranders and adulterators of food and drugs that move in interstate commerce could get around the Act simply by "decentralizing" certain phases of their operations. A nationwide operator who, before the 1948 amendment, could get away with mixing or processing his product at one central location and then shipping it interstate for misbranding or adulteration in the state of sale,[7] could now escape the effect of the amendment by varying his operation solely to the extent of doing the mixing or processing at the same place he does

---

[6] *Brosious* v. *Pepsi-Cola Co.*, 155 F. 2d 99 (C.A. 3), also cited by petitioners (Pet. 12), is not at all in point. That was a suit for treble damages under the anti-trust laws. The holding that the interstate movement of the beverage concentrate ended before it was combined with sugar and carbonated water and then bottled has no bearing at all upon the application of the clause of the Federal Food, Drug and Cosmetic Act involved here, providing for the seizure of an article that is adulterated or misbranded "while held for sale * * * after shipment in interstate commerce." See *United States* v. *Sullivan*, 332 U.S. 689.

[7] *United States* v. *Phelps Dodge Mercantile Co.*, 157 F. 2d 453 (C.A. 9), certiorari denied, 330 U.S. 818, so held. It was one of the purposes of the 1948 amendment to cure the defect revealed by this decision. See S. Rep. No. 1221, 80th Cong., 2d Sess., p. 1.

the misbranding or adulteration. And if the simple mixing involved in the instant case is a sufficient "change in form" to achieve this result, presumably almost anything, such as addition of a coloring agent, would do. It is not reasonable to suppose that Congress intended to permit such artificial distinctions to defeat its purpose.

2. *United States* v. *Sullivan*, 332 U.S. 689, is a conclusive answer to petitioners' contention (Pet. 12–15) that the application of the statute to its intrastate activities is beyond the power of Congress under the commerce clause of the Constitution. That was a criminal prosecution for violation of Section 301(k) of the Act (21 U.S.C. 331(k)), which prohibits "the doing of any * * * act with respect to a * * * drug * * * if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being * * * misbranded." The case involved a 1,000-tablet bottle of sulfathiazole that, when it was shipped in interstate commerce, was in compliance with the law. The defendant, a retail druggist, purchased the properly labeled interstate package from a local wholesaler for his drugstore. Nine months later he removed some of the tablets from the interstate container and caused them to be misbranded before he sold them to the consumer. This Court held that Section 301(k) "unqualifiedly prohibits misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the inter-

state shipment" (332 U.S. at 696); that the section was "designed * * * to extend the Act's coverage to every article that had gone through interstate commerce until it finally reached the ultimate consumer" (*id.*, 697); and that as so construed it was not beyond the authority of Congress and did not invade the powers reserved to the States (*id.*, 697–698).

In passing the 1948 amendment on which the instant case centers, Congress gauged the extent of its constitutional power by the *Sullivan* case:

> The Supreme Court's decision in the Sullivan case has ended any doubts that may have existed as to the authority of Congress to regulate in the manner proposed by this bill. * * * (S. Rep. No. 1221, 80th Cong., 2d Sess., p. 4)

Surely, if Congress has the power to punish the act of a Sullivan in removing a few pills from an innocent interstate package and selling them, misbranded, to a local purchaser long after the interstate shipment had come to rest, there can be no question of its constitutional power to authorize the seizure of the mixture of innocent interstate oils that petitioner misbranded and adulterated.

CONCLUSION

The decision below is a correct application of established principles. No conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

ROBERT S. ERDAHL,
Attorney.

WILLIAM W. GOODRICH,
Assistant General Counsel,
Department of Health, Education,
and Welfare.

AUGUST 1961.

U.S. GOVERNMENT PRINTING OFFICE 1961